

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SIDNEY MEINHARDT
Claimant

VS.

AMMON PAINTING
Respondent

AND

BUILDERS ASSOC. SELF-INSURERS FUND
Insurance Carrier

Docket No. 247,454

ORDER

Respondent and its insurance carrier requested review of the January 6, 2006 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on April 26, 2006.

APPEARANCES

Mark E. Kolich, of Lenexa, Kansas, appeared for the claimant. Wade A. Dorothy, of Lenexa, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that claimant's average weekly wage and entitlement to temporary total disability is no longer in dispute and those findings can be affirmed. The parties also agreed that the issue of retirement credit under K.S.A. 44-501(h) is no longer in dispute and can likewise be affirmed.

ISSUES

The ALJ found that it was more probably true than not that the claimant sustained injury, on December 9, 1997, to both his right and left lower extremities which constituted a whole body injury based upon K.S.A. 44-510e. The ALJ went on to explain that it was

not necessary for claimant's difficulties with his right lower extremity to occur at the same time as the left provided they were a direct and natural result of the original injury.¹ Having made that factual finding, the ALJ awarded the claimant a 72.6 percent work disability based on a 80 percent task loss and 65.2 percent wage loss.

The respondent requests review of the nature and extent of claimant's impairment, including the ALJ's decision to award work disability benefits. While respondent concedes claimant sustained an accidental injury on December 7, 1997, respondent argues that claimant's injury is limited to his left foot and ankle based upon the treatment records and diagnosis made by Dr. Greg Horton. And because this constitutes a scheduled injury under K.S.A. 44-510d, claimant's recovery is limited to a 10 percent permanent partial disability to the left lower leg.

Alternatively, respondent argues the claimant is capable of earning as much as \$11.85 per hour even given his present condition, which would translate to a 54 percent wage loss. Thus the ALJ should have imputed a higher wage to claimant as he has failed to put forth a good faith effort to find appropriate post-injury employment. Respondent also contends the ALJ failed to consider Dr. Horton's zero percent task loss and had he done so, averaging that figure with the 90 and 70 percent opinions, the resulting task loss would have been 53 percent.

Claimant argues the Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ succinctly and accurately set forth the facts and circumstances surrounding claimant's injury, his subsequent treatment and present complaints. Accordingly, the Board adopts them as its own. Although initially there was some dispute as to claimant's average weekly wage, his entitlement to temporary total disability benefits and whether respondent was entitled to a retirement benefit offset based upon K.S.A. 44-501(h), those issues are no longer in dispute and are summarily affirmed.

The sole remaining issue is the nature and extent of claimant's impairment and resulting disability. This issue necessarily includes the issue of whether claimant's resulting impairment is one governed by the schedule of injuries contained within K.S.A 44-510d, or if claimant sustained a whole body injury that falls outside the schedule and is

¹ ALJ Award (Jan. 6, 2006) at 5.

governed by K.S.A. 44-510e(a) and the work disability principles set forth in *Foulk*² and *Copeland*³.

The ALJ considered the evidence and concluded that it was “more probably true than not true” that “claimant did sustain injury to his right lower extremity in addition to the injury sustained on his left lower extremity.”⁴ The Board has reviewed the record as a whole and finds the ALJ’s Award must be modified.

It is uncontroverted that none of claimant’s medical records contain any reference to a right foot injury or complaint until February 1, 1999, over a year after claimant’s initial accident when he fell off a scaffold and fractured his left heel. During that time period, Dr. Horton saw claimant several times, referred him to physical therapy and eventually to a work hardening program. Following that program, the physical therapist indicated claimant’s performance during work hardening was paralleling his job duties. Thus, in April 1998, Dr. Horton released claimant to return to work without restrictions. Then, on May 18, 1998, Dr. Horton rated claimant’s condition and assigned a 7 percent impairment of the left foot and ankle.

Claimant returned to see Dr. Horton after May 1998 voicing plantar fasciitis complaints in his left foot. Dr. Horton provided claimant with injections. Then in January 1999, claimant returned and told Dr. Horton of an incident where claimant felt a “pop” in his foot followed by some swelling. The records do not indicate in which foot this “pop” occurred. Dr. Horton treated claimant and saw him again on February 1, 1999. At this visit, at least according to Dr. Horton’s records, claimant first expressed complaints regarding his right foot. At his deposition, Dr. Horton testified that he found no connection between these right foot complaints and claimant’s accident. Rather, claimant’s complaints are simply consistent with plantar fasciitis. Dr. Horton released claimant to return to work at full duty and increased his rating to 10 percent to the left foot and ankle for claimant’s ongoing complaints.⁵

Both claimant and his wife contend they told Dr. Horton of claimant’s right foot complaints before. But, they argue, given the severity of the left foot injury and the ongoing complaints, the left foot was the major focus of treatment and concern. Claimant’s counsel also argues that Dr. Horton admitted that his record keeping was less than all-inclusive. According to Dr. Horton, he makes “office notes because Medicare audits me” and

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ ALJ Award (Jan. 6, 2006) at 5.

⁵ All impairment ratings are made pursuant to the AMA Guides, 4th edition.

“probably would be under some sort of penalty of law” if he didn’t.⁶ He went on to explain that he writes down things that he thinks are “germane to the patient’s treatment.”⁷ When asked later, he further testified that “if he [claimant] complained about both feet then it would be my usual practice to at least evaluate and/or treat both feet, certainly with the use of x-rays.”⁸

In contrast to Dr. Horton’s testimony that claimant’s impairment is limited to his left lower extremity, is that offered by Dr. P. Brent Koprivica, the physician retained by claimant’s counsel to render an opinion as to claimant’s condition and permanency. According to Dr. Koprivica, who examined claimant on October 19, 2000, claimant advised him that he had injured both feet in his accident. Dr. Koprivica confirmed that there were no complaints noted in Dr. Horton’s records, and that claimant had not received any treatment to his right foot. However, he reasoned that claimant’s left foot fracture was the more serious injury and it was reasonable for the physicians to focus on that issue. Dr. Koprivica diagnosed a left calcaneal fracture, which was treated in a closed fashion with a CAM walker, as well as bilateral forefoot pain and plantar fasciitis. And according to Dr. Koprivica, these conditions are all attributable to the December 9, 1997 accidental injury.

Dr. Koprivica rated claimant with a 17 percent impairment of the left lower extremity for the fracture and plantar fasciitis and 2 percent to the right lower extremity for plantar fasciitis. When combined, this yields an 8 percent to the whole body.

When the parties were unable to agree upon a functional impairment, the ALJ assigned Dr. Theodore Sandow to conduct an independent medical examination pursuant to K.S.A. 44-510e(a), in April 2003. According to Dr. Sandow, claimant told him he injured both feet in his accident but that the left foot was hurt worse. Dr. Sandow reviewed all of the pertinent medical records and like the other physicians before him, diagnosed a fracture of the left heel along with bilateral chronic plantar fasciitis. Dr. Sandow testified that plantar fasciitis will make you limp and can be quite painful. He assigned a 15 percent permanent partial impairment to the left lower extremity and a 2 percent permanent partial impairment to each lower extremity for a total of 7 percent to the whole body. Dr. Sandow also indicated that he felt the bilateral plantar fasciitis was caused by the 1997 accident.⁹

During cross examination, Dr. Sandow was asked whether he would expect someone like the claimant, with bilateral plantar fasciitis, to be walking barefoot, working outside in a garage, bending, stooping, lifting various weights, cleaning up generally,

⁶ Horton Depo. at 22.

⁷ *Id.* at 22.

⁸ *Id.* at 24.

⁹ Sandow Depo. at 14.

sweeping with a broom, and walking without a limp. Dr. Sandow indicated he would not expect that claimant would do such things barefooted and that if he had, those activities would likely aggravate his symptoms.

Indeed, there is a videotape of claimant performing just the sort of activities that were itemized in Dr. Sandow's deposition. This videotape, which admittedly depicts claimant's activities on several days in May 2004, reveals claimant is capable of walking, bending, stooping and performing other activities, even at times barefooted, without any evidence of a limp or discomfort, even on his left foot, the foot that was fractured in the 1997 injury.

Based upon the language contained within the Award, the ALJ believed the lack of contemporaneous complaints to both feet was irrelevant as Dr. Koprivica testified that the complaints relative to the right foot was "a direct and natural result of the initial injury or original injury sustained to the left lower extremity".¹⁰ Accordingly, the ALJ concluded claimant sustained a bilateral foot injury, one that falls outside the schedule of injuries set forth in K.S.A. 44-510d and awarded claimant a work disability under K.S.A. 44-510e(a).

The Board is not persuaded that claimant's present right foot complaints were caused by or the direct and natural result of his initial injury. While it is true that claimant and his wife both testified that they told or heard the other tell Dr. Horton of the right foot complaints, there is no evidence of those complaints in his records. Even Dr. Horton candidly admits that had claimant complained of a neck or shoulder problem, he might not have noted the complaint. But given the fact that he specializes in the treatment of foot and ankle problems, when a patient voices a complaint about a foot, he believes he would have noted that problem.

Moreover, there are no other records which indicate claimant's initial injury was not just to his left foot. He attended physical therapy sessions and a work hardening program. Of the records that were produced, none reference a right foot complaint. Even Dr. Koprivica's initial examination makes little mention of the right foot complaints and he saw claimant almost 3 years after the injury.

The most telling evidence of all is the videotape of claimant's activities in May 2004. He can be seen walking around outside, barefoot, on a hard surface. There is no indication that he is in pain, he does not limp nor does he favor the left foot, the foot that sustained a fracture. His actions in May 2004 do not comport with his recitation to Dr. Sandow in April 2003 that his pain levels were between a 7-10 on a scale of 1 to 10.

When all this evidence is taken together, the Board finds it is unpersuaded that claimant's permanent impairment extends to anything other than his left lower leg at the

¹⁰ ALJ Award (Jan. 6, 2006) at 5.

level of the ankle. Accordingly, the Board modifies the ALJ's Award to reflect a 10 percent impairment to the left lower leg.

With this finding, the remaining issues relative to work disability are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated January 6, 2006, is modified as follows:

The claimant is entitled to 16.67 weeks of temporary total disability compensation at the rate of \$351.00 per week in the amount of \$5,851.17 followed by 17.33 weeks of permanent partial disability compensation, at the rate of \$351.00 per week, in the amount of \$6,082.83 for a 10 percent loss of use of the lower leg, making a total award of \$11,934.00.

All other findings are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of May, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director